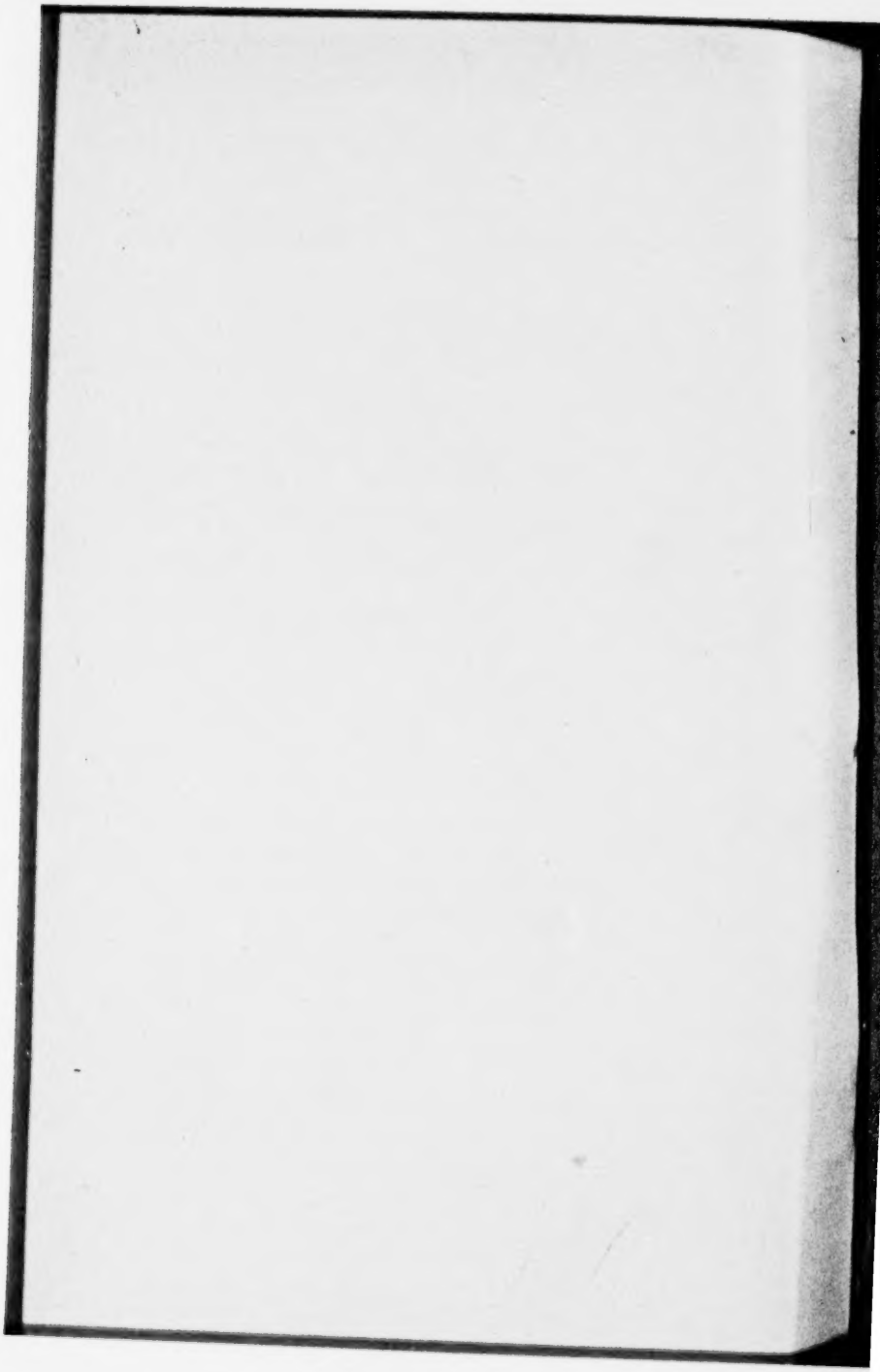

IN THE

Supreme Court of the United States

No. 237 October Term, 1904.

CHRISTIAN SCHWARTZ, *et al.*,

vs.

JOHN DUSS, *et al.*,

Petition for Re-Argument.

GEORGE SHIRAS, JR.,

S. SCHUYLER OTIS,

Solicitors for Petitioners.

SUPREME COURT
OF THE UNITED STATES
JAN 6 1905

SUPREME COURT OF THE UNITED STATES.

No. 38 OCTOBER TERM, 1902

CHRISTIAN SCHWARTZ, et al.

vs.

JOHN DUSS, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come George Shiras III. and S. Schoyer, Jr., attorneys for the above named plaintiffs, petitioners, and respectfully pray this Honorable Court for a re-hearing of the above entitled cause for the following reasons, to wit:

First. This Court in its opinion says:

> **"The Master, and both the Circuit Court and the "Circuit Court of Appeals, found that the Society had "not been dissolved, either by consent of its members "or the abandonment of its purposes for which it was "founded. On account of this concurrence the *dis-"puted facts* involved in that finding, under the rules "of this Court and the circumstances of the record, we "do not feel disposed to review."**

Apparently plaintiffs' counsel have failed to make themselves clear on this branch of the case.

We have not intentionally asked that a single disputed fact be reviewed by this Court, although in the printed brief and oral argument certain facts were necessarily presented at length. The Master and the lower Courts in their conclusions of law, based upon such facts, were alleged to have erred in those conclusions. Upon these questions of law we have based our Assignments of Error and our oral and printed arguments. In the "Agreed Record" there has been printed all that relates to the questions under review.

For example: it is admitted that in 1892 a large number of the leading members of the Harmony Society filed a bill in Beaver County asking for a dissolution of the Society, for the appointment of a Receiver and the distribution of its assets; that shortly thereafter,—before and after said bill was withdrawn by amicable agreement,—Mr. Duss, the Senior Trustee, had his counsel draw up certain papers, marked Exhibits 1, 2, 3, 4, 5, 6, 7, 10, 12, 12½, in the "Agreed Record," (pages 235-246) wherein the signers thereof accepted money, land or both, in *discharge of their claims upon the assets of the Society*. Several of said exhibits show that the amount received was based upon a pro rata distribution according to the number of living members and what the Society would realize from its assets in case of liquidation (*vide e*. No. 2). At the time of filing the present bill, seventeen active members, comprising practically the whole Board of Elders and the Society's leading officers, had received on an average five thousand dollars a piece, and others were negotiating for their share.

Now the plaintiffs contend that an examination of these facts, and a construction of the deeds of settlement will lead to the following conclusions of law:—

First. That the depletion of the Society so that the membership only sufficed to fill the Board of Elders was a destruction of the "community" in a legal sense. The Master found that numbers were immaterial under the Articles of Association, and this made it possible for one or two members to constitute the "community" Upon this conclusion of law we allege error.

Second. That these settlements constituted a *liquidation* and recognition of *individual ownership in the surviving members,* and that a continuation of this system, necessarily provided a secret means of dissolution and the apportionment of the vast assets among such members, as was openly attempted by the Bill in Equity, referred to, praying for a dissolution. The Master held as a matter of law that these settlements were mere "donations." This conclusion of law we have also assigned as error, and have printed in our Record all the deeds, which the Master excluded from his Report, although considered of the greatest importance by the plaintiffs.

Had this Court held that the present plaintiffs possessed a proprietary interest it seems plain to us that the defendants under the above facts should have been restrained from further depletion of the assets of this Society, whether the Society was ended or not.

Again: in regard to the transfer of the remaining property of the Society to the Union Company, the facts show that the home of the Society and its vast acreage were conveyed to a corporation authorized to sell the same; that it was wholly managed by a Board of Directors whose duties are solely defined by the statute laws of the State of Pennsylvania, and that only one of these Directors was a member of the Society, so that the Board of Elders who now comprise the sole remnant of the alleged Society are wholly without authority to manage its temporal and spiritual affairs in accordance with the Article of Association. The Master held, as a matter of law, that such transfer was legal and not contrary to the laws or

usages of the Society. This seems like plain error for the Articles never contemplated such outside management or a complete destruction of its peculiar system of government and its doctrine of community of goods based upon Christian fellowship. Such conclusions by the Master, we submit, are ones of law, and reviewable by this Court.

Second. The Court in its opinion seems to deny proprietary reversionary interests in the trust properties in the petitioners for the following reasons:

1. Because none of the ancestors of any of the petitioners had ever contributed property to the Society:

2. Because if they had made such contribution they and their descendants were barred by the articles of 1836 from maintaining this proceeding:

3. That petitioners' contention constituted the members at once *donors* of the trust properties and *donees of each other*.

4. That the effect of such contention would exclude the descendants of those who had originally contributed the property of the Society from any participation therein.

Apparently petitioners' counsel have failed to impress the Court in their printed and oral arguments with their true contention, namely; that the bill is not filed against a *going* Society, or for specific contributions made individually by plaintiffs' ancestors; but upon the hypothesis that the Society has ceased to exist and that the trusts have terminated, and that therefore the trust properties revert to the donors, and that those donors consist of all signers of the Articles of 1836 and 1847 living, including the present membership and the heirs of those dying in the Society; that the interest of each of those donors in the property thus donated was equal by reason of the

conversion of all the property of the Society into a "joint and indivisible stock."

It is respectfully submitted that the petitioners have never claimed, as seems to be assumed in the opinion of the Court, that the members of the Society, as such, *were donees of each other.* Their contention is that as the creators of the trust fund they were *donors;* that the *Society,* as a *Society,* was the *donee,* for which, and for which only, the trust was created, and that the members, as such, were not *donees* at all, but were only entitled by contract, so long as the Society lived, to the maintenance and provisions for their physical welfare recited in the articles; although in the event of dissolution and the failure of the trusts, they as signers of the Article of 1847, are also in the class of donors and reversioners.

Third. Petitioners have contended that there is no provision in the Articles of October 31, 1836 (Record, page 224) or in any subsequent article which precludes the heirs of ancestors, who became jointly interested in the "joint and indivisible stock" by those articles created, from claiming a reversionary interest in the trust property upon *failure of the trust;* that the following provision of those articles is restricted to demands and claims for restitution of contributions which by pre-existing articles they were entitled to upon withdrawal from membership.

That provision is as follows:

> "3rd. Should any individual withdraw from the "Society, or depart this life, neither he, in the one case, "nor his representatives in the other, shall be entitled

"to demand an account of *said contributions,* whether "in land, goods, money or labor, or to claim anything "from the society as matter of right. * * *"

The *"said contributions"* referred to in the paragraph quoted are those contributions which had been subject to restitution upon withdrawal, as provided for in the Sixth Article of the Agreement of 9th of March, 1827, recited in the Articles of 1836, and which is as follows:

"And it would so happen as above mentioned, that "any of the undersigned should violate his or their "agreement, and would or could not submit to the laws "and regulations of the church or community, and for "that or any other cause should withdraw from the as- "sociation, then the said George Rapp and his asso- "ciates agree to refund to him or them the value of all "such property as he or they may have brought into "the community, in compliance with the first article of "this agreement, the said value to be refunded without "interest in one, two or three annual installments, as "the said George Rapp and his associates shall deter- "mine."

"And if any person or persons so withdrawing "themselves were poor, and brought nothing into the "community, yet if they depart openly and regularly, "they shall receive a donation in money, according to "the length of their stay and to their conduct, and to "such amount as their necessities may require in the "judgment of the superintendents of the association."

The evident intent was not merely to annul and make void that article in its entirety, but to bar any future claim for in-

dividual restitution of property theretofore contributed; and to convert property so contributed into "joint and indivisible stock" forever, including all future contributions whatever they may be, whether in land, goods, money or labor.

The provision quoted has never been repeated in any subsequent articles of the association; because by the creation of "joint and indivisible stock" and the conveyance of it by absolute title to Trustees for the use and benefit of the Society, any such provision became unnecessary, as no ***individual*** right of property therein thenceforth existed in any member so long as the Society continued to exist as a going Society. However, when the Society ceases to exist and the trusts have been defeated, the trust property thus created does revert to the present members, not as members but as donors, in common with the heirs of all other members donors who had signed the Articles of 1836 and 1847, barred by no provision in the Articles of 1836 and 1847, or of any subsequent articles of the Society. The trust fund this created and thus to revert, include all the property of the Society, whether the same consist of lands, goods, money or *labor or profits of labor.*

The Articles of October 31, 1836, drew a complete line of demarkation between the relation of members of the Society to its property existing prior to that date, and such relations existing after the date of the Articles of October 31, 1836. Before that date the property of the Society was held subject to the right of restitution to contributors; afterwards by virtue of those Articles of 1836, those rights of restitution were surrendered, and not only were provisions of previous articles, which had been prescribed for the protection of that right ab-

rogated, annulled and made void, but all such owners of the right of restitution voluntarily barred themselves from ever demanding an accounting of those contributions; and thereupon all the then existing property and all future property was to be held for the benefit and use of the Society forever, as "joint and indivisible stock."

We respectfully submit to the Court that petitioners' counsel have failed in their printed brief and oral argument to impress these contentions fully upon the mind of the Court.

Fourth. Counsel also submit to the Court that the finding of the Master that no contributions were made by the ancestors of the petitioners to the property of the Society is purely *a negative finding.* No testimony was offered by petitioners upon that point, because it was deemed and is now deemed to be outside of the issue and irrelevant. The bill is not filed against the Harmony Society.

Fifth. Counsel also call the attention of the Court in respect of the position expressed in the opinion of this Court that the successful contention of the petitioners would exclude the descendants of those who had originally contributed property to the Society, to the fact that the question involved was not considered either in their printed or oral argument. So far as the same may be deemed essential, counsel now present to the Court the statement that every person having any interest in the Society's property on October 31, 1836, entered into the Articles of October 31, 1836.

By the Articles of 1805 (Exhibit A, p. 218) and of March 9th, 1827 (page 221 of the Record) the only rights reserved to members in this connection were in favor of withdrawing members being restored to their contributions. The Society was a *going*, an *existing* Society, and therefore those who died in the Society left no transmissable rights to their descendants; those contributing members who withdrew from the Society got their contributions back and executed releases; those who were poor and contributed nothing to the Society, but withdrew, received donations and executed releases. Hence the signers of the Articles of 1836, embraced all who had any interest in the property of the Society.

But if there be any descendants of those who originally gave property to the Society who are not barred, the position of the petitioners is broad enough to include them as reversioners.

Sixth. The opinion of the Court seems to admit the existence of a trust under which the properties of the Harmony Society are held, but does not dispose of the question as to where those properties shall go in the event of the dissolution of the Society and the termination of the trusts; there being no provision anywhere for any remainder over, or for a system of tontine, or for a joint tenancy with right of supervisorship, the property being vested absolutely in trustees who expressly declare their trust to be for the benefit and use of the society.

The Trustees cannot hold it. The surviving members, as such, do not take it as survivors, and the society, being the only donee, has ceased to exist.

Seventh. Assuming however, that the Society is not in point of fact dissolved; that the trusts are in full efficiency; that the petitioners have no proprietary rights as reversioners of the trust funds, yet it is submitted that the bill should not be dismissed because the petitioners by virtue of their blood and kinship and heirship, have standing in equity to enforce and conserve the trusts which their ancestors had created from being wasted and devastated by the trustees, and the surviving members, the latter of whom have only a contract right of maintenance out of the income of those funds.

We respectfully submit that if the present plaintiffs and the class they represent are to be denied any relief, this Court sitting in equity, should in some way conserve the trust, if satisfied that the plaintiffs are correct in their contentions that the trust has failed through the active efforts of the defendants upon whom rest the duty of fostering it. If we, as the admitted next of kin belonging to a class that always, in the eye of law, stands as *prima facie* the successors to their ancestors' title are cut out by this trust, are we not as such entitled to know whether such trust is ended and if so to whom our ancestors' property shall go? Are the present defendants *by mere right of possession*, possessing no individual ownership under the trust to be permitted to violate its provisions, even to the extent of taking unto themselves the very property created by our ancestors towards which they contributed nothing, while we are powerless by reason of the same trust to either share in the assets or in any way conserve the same?

While this was a going Society the present plaintiffs never sought to interfere, but maintained the friendliest relations toward it; and now that they think that it is ended through no fault of their own, we respectfully contend that the many years of laborious litigation and the burdensome costs imposed upon them, warrants this Court in so construing this trust as

not to make it possible for the survivors of this Society to take what does not belong to them, when in good faith the present plaintiffs have only sought for the determination of a question of law never heretofore decided. That as the present Court has itself been divided on the question of the proprietary right of the heirs of deceased members, in case of dissolution of the Society, we would respectfully suggest that such a contention was not without sufficient merit to warrant the present plaintiffs in seeking a determination thereof. It may be that in case of a re-argument this Court may formulate such a decree as will conserve this trust, or if convinced that the Society is ended will indicate to whom the property shall go.

Counsel respectfully recall to the attention of the Court the great value of the properties involved; the importance of the determination of titles and of the rights of descendants, and suggest that upon re-argument, if it be granted, they may cause the grounds of their contention to be more clearly and logically presented than in their former printed and oral arguments.

The attention of the Court is respectfully called to the fact, that even if the ancestors of petitioners had contributed no property to the Society, it is clear that neither of the eight surviving members has contributed any; and that most of them joined the Society as late as 1890, and none of them prior to 1889. Yet apparently, these survivors, non-contributors as

they are, have the uncontrolled enjoyment of this vast property, without supervision, representing as it does the property and profits of labor of several generations of members, now deceased, covered by the terms of a trust which it is difficult to see, ever contemplated such a result.

And your petitioners pray that an order may be made for the hearing of re-argument in this cause on a day to be appointed by the Court, and at such time and upon such points as the Court may direct.

GEORGE SHIRAS, III.,
S. SCHOYER, JR.,
Attorneys for Petitioners.

We hereby certify that this petition for a re-hearing is presented in good faith, and we believe it is on meritorious grounds.

GEORGE SHIRAS, III.,
S. SCHOYER, JR.,
Attorneys for Petitioners.